to the carrying out of a granted power. Yet even were the necessity for the primary the test, though formerly as an abstract proposition not as necessary as now, still if it were the method actually used to select candidates for the final election, it would be just as necessary to that election as when the final choice is to be by the people. As to the second reason, in whatever form the final election take place, it would seem just as necessary and proper that Congress should regulate any process whose purpose is to present candidates, in order effectually to control such election.[20]

If the intimation of the minority is true, that if Congress cannot regulate the primaries by the grant of power under Art. I, Sec. 4, neither can the states, then the decision in the instant case is deplorable. And this minority position seems sound. The right to vote for members of Congress is based on the Constitution,[21] and the states' right to control it is derived from Art. I, Sec. 4.[22] Clearly "election" can mean no more in regard to the states than in regard to Congress. If the States then have any power to regulate primaries, it must be under the Tenth Amendment.[23] By this amendment the states "reserve" the powers they had before the Constitution. The states obviously did not have the power to regulate the nominations for federal officials before the Constitution, for there was no federal government. Moreover since the Constitution and the formation of the federal government were the work of the people and not a compact between the states, the states cannot have this power on the theory that they themselves created the institution and thus, where they have not specifically granted their powers away, may control it in all its functionings. It seems as a result that all control by the states over federal elections must come from Art. I, Sec. 4, and is no part of their "reserved" powers, on the simple reasoning that the states could not reserve a power they never had.[24]

The instant decision, in contrast with previous holdings of the court, leaves the United States not supreme in the exercise of its own proper powers.[25] And as a result, we have the strange anomaly that the federal government must look upon frauds perpetrated for the purpose of sending men to its Congress and not have the power to prohibit or punish them. And if, as seems probable, the states have no power over them, then at present, they are wholly unpunishable.

INSURER'S RIGHT TO RECOVER PAYMENT MADE UNDER MISTAKE OF FACT IN ADJUSTING POLICY-CLAIM.—The recent case of *Fireman's Fund Insurance Co.* v. *Vinton*[1] raises again the interesting question of the right of an insurer to recover a payment made in settlement of a policy-claim when the parties were

[20] Indeed under the system prevailing in many states before the popular election of Senators, it was even more vital that Congress have the power to control the nominating process. Under that system, the selections at the primaries by the people were in effect a mandate to the legislature as to who was to be elected, so that the nominations were in substance the elections themselves. See Merriam, *Primary Elections* (1909) 159.

[21] *Wiley* v. *Sinkler* (1900) 179 U. S. 58, 21 Sup. Ct. 17.

[22] See *Ex parte Siebold, supra,* footnote 18, p. 383; *Hawke* v. *Smith* (1920) 253 U. S. 221, 231, 40 Sup. Ct. 495.

[23] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[24] *Cf.* Powell, *The Child Labor Law* (1918) 3 Southern Law Quart. 175, 176; see *Sturges* v. *Crowninshield* (U. S. 1819) 4 Wheat. 122, 193.

[25] But *cf. M'Culloch* v. *Maryland, supra,* footnote 8, p. 405; *Cohens* v. *Virginia* (U. S. 1821) 6 Wheat. 264, 381, 387; *Pacific Ins. Co.* v. *Soule* (U. S. 1868) 7 Wall. 433, 444.

[1] (N. Y. Sup. Ct., App. T. 1921) 190 N. Y. Supp. 525.

mutually mistaken as to the existence of facts which would nullify the insurer's liability. The complaint alleged that upon a warranty contained in the application for the policy and in the proofs of loss that the defendant was the sole and unconditional owner, a payment was made to the defendant-assured for the theft of an automobile, and that such warranty was false for, upon the plaintiff's locating the automobile and laying claim to it under the insurer's subrogation rights, the real owner reclaimed and retook the car. A unanimous court held that in the absence of an averment in the complaint of any fraud or bad faith on the part of the defendant, the demurrer to the complaint must be sustained, citing as authority *National Life Ins. Co.* v. *Minch*,[2] *Smith* v. *Glen's Falls Ins. Co.*[3] and May on *Insurance*.[4]

It is well settled law that money may be recovered if paid under a mutual mistake as to a fact which if true would have given rise to a right-duty relationship between the payor and payee.[5]

No exception to this rule as to an insurer is made in England. An insurer can recover money paid in ignorance of a breach of warranty or under a mutual mistake of fact.[6] In *De Hahn* v. *Hartley*[7] recovery by a marine insurer of money paid in ignorance of a breach of warranty was allowed; counsel in that case did not even raise the question whether such action would lie. In *Anderson* v. *Pitcher*[8] recovery by a marine insurer of money paid under a mutual mistake as to the existence of a breach of warranty was allowed. In *Bilbie* v. *Lumley*,[9] Lord Ellenborough also assumed that a marine insurer could recover a payment made under a mistake as to the existence of a breach of warranty; he pointed out that in the case before him the insurer, having paid with knowledge of all the facts and merely under a mistake as to his liability on those facts, which was regarded as a mistake of law, could not recover.

Several New York cases have apparently followed this view of the law. In *Elting* v. *Scott*[10] Chancellor Kent assumed that a marine insurer could recover a payment made under a mistake as to the existence of a breach of warranty; the decision was in favor of the assured upon another point. In *Sears* v. *Grand Lodge A. O. U. W.*,[11] where an insurer in consideration of the discontinuance of an action had made a contract of adjustment by which it promised to pay a sum certain absolutely, regardless whether the assured was alive, and an additional sum if it failed to produce satisfactory evidence within a certain time that the assured was still alive, the court held that the assured could recover the sum promised absolutely. The court said that under this particular contract the insurer "assumed the risk and calculated the chances" of the assured being alive, and that "in view of all the circumstances it cannot be said that the parties entered into the agree-

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[2] (1873) 53 N. Y. 144.
[3] (1875) 62 N. Y. 85.
[4] 2 May, *Insurance* (4th ed. 1900) § 575.
[5] *Rheel* v. *Hicks* (1862) 25 N. Y. 289; Keener, *Quasi-Contracts* (1893) c. II; Woodward, *Quasi-Contracts* (1913) c. II; 5 Joyce, *Insurance* (2d ed. 1918) § 3486.

Of course, where the fact even if true would not give rise to a right-duty relationship between the payor and payee, as in the case of a payment by a drawee to a holder of negotiable paper under a mistake as to the genuineness of the drawer's or endorser's signature, etc., no recovery will be allowed. See Woodward, *op. cit.* c. V.
[6] See 5 Joyce, *op. cit.* § 3486.
[7] (1786) 1 Term Rep. 343, *aff'd* (1787) 2 Term Rep. 186. Lord Mansfield, *C. J.*, Ashhurst and Buller, *JJ.*
[8] (1800) 2 Bos. & P. 164.
[9] (1802) 2 East 469.
[10] (N. Y. 1807) 2 Johns. Sup. Ct. *157.
[11] (1900) 163 N. Y. 374, 57 N. E. 618.

ment laboring under a mutual mistake of fact." Likewise in *National Life Ins. Co.* v. *Jones*[12] the insurer could not recover the payment because the court found that the payment was made with full knowledge of the facts and in pursuance of what was considered to be good business policy not to dispute claims, and that here was no payment under a mistake of facts for which relief could be had.

There seems to be no satisfactory authority compelling the exception in the instant case. That an insurer cannot have such recovery unless he proves fraud has never been squarely decided in New York, and whatever dicta in support of such doctrine exist in New York are based upon a misreading of the decision in *Mutual Life Ins. Co.* v. *Wager*;[13] and the decisions or dicta elsewhere[14] are merely a perpetuation of this error. An isolated statement out of its context from *Mutual Life Ins. Co.* v. *Wager* was paraphrased and cited by Church, *C. J.*, as authority for the dictum in *National Life Ins. Co.* v. *Minch*,[15] which in turn was cited by Church, *C. J.*, as authority for the dictum or at most a second ground for the decision in *Smith* v. *Glen's Falls Ins. Co.*[16]

As a matter of fact Sutherland, *J.*, who rendered the opinion in *Mutual Life Ins. Co.* v. *Wager*, never decided what the subsequent cases erroneously supposed. In that case the action was brought by the insurer on the theory that there was fraud by the defendant-beneficiary in warranting the assured to be of good health and in his proofs as to the cause of the assured's death. The defendant-beneficiary had added to his warranty of the assured's health the significant phrase "to my knowledge." The court said that under a contract of this kind containing such qualifying words as "to my knowledge," it would have been incumbent upon the insurer in defending an action on the policy to have proven that the beneficiary knew of the breach of warranty or its falsity, and consequently the plaintiff-insurer having paid under such a policy, could not recover unless he could show fraud either in the inception of the contract or in inducing the adjustment of the loss.[17] And furthermore the court implied that a payment by an insurer under a mutual mistake of fact without negligence on its part could be recovered.[18] The

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[12] (N. Y. 1873) 1 Thomp. & C. 466.

[13] (N. Y. 1858) 27 Barb. 354.

[14] *Rome Grocery Co.* v. *Greenwich Ins. Co.* (1900) 110 Ga. 618, 36 S. E. 63; *Kansas City Life Ins. Co.* v. *Blackstone* (Tex. Civ. App. 1912) 143 S. W. 702; *Stache* v. *St. Paul Fire & Marine Ins. Co.* (1880) 49 Wis. 89, 5 N. W. 36; see *Metropolitan Life Ins. Co.* v. *Harper* (C. C. 1878) Fed Cas. No. 9505; *cf. Centennial Mutual Life Ass'n* v. *Parham* (Tex. Civ. App. 1891) 16 S. W. 316.

[15] *Supra*, footnote 2.

[16] *Supra*, footnote 3.

[17] " . . . in other words to prove *fraud on the part of Wager, such proof of fraud would have been required by this peculiar contract* [containing the words "to my knowledge"], *and not by the general principles of law applicable to these contracts of insurance. If, in an action by Wager on this policy for the amount insured,* the company would have been compelled to prove that the representations as to Frisbie's health were *false to the knowledge of Wager when made,* such proof would have been required, *because they accepted Wager's declaration with these qualifying words, and made it a part of their contract of insurance.*" Sutherland, *J.*, 365.

[18] "If he intends to plead ignorance merely of a fact, which if known would have prevented his making the contract originally, he must do it when called upon to carry the contract into effect, *if upon inquiry he could have informed himself of such fact.* To permit him, after its full execution by the payment of money, to recover back the money on the ground of ignorance, merely, of such fact, would, in effect, be to permit him to try the same question twice, on the same evidence; or to repent, and revoke a voluntary act. *The payment with the knowledge, or with the means of knowledge, of such fact, must be deemed a voluntary payment, and the party to be estopped from alleging ignorance of such fact.*" At p. 368 (italics ours).

remark that fraud must be shown to entitle the insurer to recover was made with particular reference to the facts of that case.[19]

However, a paraphrase of this remark, with total disregard of the facts of the case and the other parts of the court's opinion, was cited as authority by Church, *C. J.*, for the dictum in *National Life Ins. Co.* v. *Minch.*[20] The court in this case merely decided that the lower court should not have non-suited the plaintiff-insurer and that there was sufficient evidence to entitle the plaintiff to go to the jury on the question whether there was fraud by the defendant-beneficiary in procuring the policy or in inducing the adjustment of the claim. The court then went on to state that *Mutual Life Ins. Co.* v. *Wager* had held that only fraud would give the insurer the right to recover the payment made. It is significant that three judges[21] concurred merely in the result.

Then in *Smith* v. *Glen's Falls Ins. Co.*,[22] where an action was brought by an assured on an independent contract of adjustment for which the alleged consideration was the surrender of the policy for cancellation, Church, *C. J.*, said that the breach of warranty as to sole and unconditional ownership could not then be set up as a defense in the absence of fraud for two reasons: first, that proper exception had not been taken to raise this point; and second, that after an adjustment or a payment, the breach of warranty was waived in the absence of fraud, citing as authority his own dictum in *National Life Ins. Co.* v. *Minch.* For the foregoing reasons, these cases are not convincing.

The influence of this dictum, grounded in error, is shown by the fact that every case and every textbook writer that has been found to declare as law that an insurer cannot recover a payment, unless it can show fraud, has cited *National Life Ins. Co.* v. *Minch* as authority. It was cited for this proposition in May on *Insurance*[23] and in Cooley's *Briefs on Law of Insurance.* It was cited as authority together with May in the Georgia case of *Rome Grocery Co.* v. *Greenwich Ins. Co.*,[25] and as authority for the dictum in *Metropolitan Life Ins. Co.* v. *Harper*,[26] and as authority in the Texas case of *Kansas City Life Ins. Co.* v. *Blackstone*,[27] and as authority together with most of the foregoing cases and textbook writers in the Wisconsin case of *Stache* v. *St. Paul Fire & Marine Ins. Co.*[28] It is therefore apparent that any authority in support of the doctrine denying an insurer recovery is merely a perpetuation of the error it is based on.

Furthermore, to effectuate a sound economic policy, the rule permitting recovery in such cases should be observed, especially under the facts of this particular case, in favor of an insurer against theft of an automobile. It is difficult to discover any rule of policy in support of the doctrine denying recovery which is applicable to insurance companies and not to ordinary mortals, unless the unintelli-

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[19] *Cf.* Judge Sutherland's opinion in *Tinslar* v. *May* (N. Y. 1832) 8 Wend. 561.

[20] *Supra*, footnote 2.

[21] Peckham, Folger and Andrews, *JJ.*

[22] *Supra*, footnote 3.

[23] *Supra*, footnote 4. In the first sentence of § 575, May states that recovery by an insurer of a payment made under a mutual mistake of fact may be had, citing *Mutual Life Ins. Co.* v. *Wager, supra*, footnote 13; and *Hartford Live Stock Ins. Co.* v. *Matthews* (1869) 102 Mass. 221. See cases cited in 2 May, *op. cit.* 1351, n. 1.

On the other hand, *Hartford Live Stock Ins. Co.* v. *Matthews* has been cited with the other cases as authority for denying the insurer recovery. See *Stache* v. *St. Paul Fire & Marine Ins. Co., supra*, footnote 14. The *Matthews* case merely held that in a tort action for deceit brought by an insurer, the jury should have been instructed that the insurer must prove that the defendant-assured knew his statements to have been false. See p. 226.

[24] 4 Cooley, *Briefs on Law of Insurance* (1905) 3877-3879.

[25] *Supra*, footnote 14.

[26] *Supra*, footnote 14.

[27] *Supra*, footnote 14.

[28] *Supra*, footnote 14.

gent one of "soaking" the insurance company. And even if, in life and in fire insurance, it represented sound policy not to unwind the transaction when once payment of the claim had been made, in the absence of fraud, still the same rule of policy, if there be any, would not be applicable under the circumstances in the instant case to insurance against theft of an automobile. In life and in fire insurance any loss means a complete loss as far as the insurer is concerned; because there is no subrogation in favor of an insurer of lives, and the right of subrogation in favor of an insurer against fire damage to property is practically valueless because so seldom invoked against third parties and, even if invoked, seldom against responsible third parties. In insurance against theft of an automobile, however, the right to be subrogated to the rights of an owner and to be entitled to claim the automobile when located is a valuable right. It undoubtedly enters into the calculation of the premium rates and is in fact an essential element in the organization on a sound basis of this form of insurance, in which the moral hazard is so very great. Salvage is as valuable and essential a right in theft insurance as in marine insurance.

This particular insurer was authorized and intended to insure an owner's and not a limited interest, and in fact insisted both in the application for the policy and in the proof of loss that the assured repeat a warranty of sole and unconditional ownership. Under the circumstances it seems quite clear that the insurer upon prompt payment of the loss-claim expected to receive and the assured to transfer the very valuable right of an owner of such automobile. The real owner of the automobile having claimed and retaken it, there was a failure of consideration in that the insurer did not get what the parties expected it would get.

Perhaps the most equitable rule would be that at least where the breach of the warranty relied on by the insurer actually defeated its right of subrogation, recovery by such insurer should be allowed. In the instant case the breach of warranty of sole and unconditional ownership defeated an actual and not an inchoate right of subrogation because the car was found. Consequently, the insurer under the facts of this particular case should have been permitted to recover.

THE MEANING OF THE WORDS "CAUSE OF ACTION" AS USED IN THE NEW YORK CODES.—In the recent case of *Bernstein* v. *Orlevitch* (App. Div., 2d Dept. 1921) 187 N. Y. Supp. 720, the plaintiff sued the director of a corporation, alleging a violation of his rights as a stockholder and also a violation of rights under a contract to buy stock. *Held,* the causes of action should be separately stated. This decision suggests an inquiry into the nature of a cause of action, inasmuch as the courts rarely give any reasons for decisions of this kind.

(1) Under the New York Code of Civil Procedure it was stated that the complaint must contain "A plain and concise statement of the facts constituting each cause of action."[1] The Civil Practice Act states that it must contain "A statement of each cause of action."[2] But the Act calls the complaint a pleading[3] and says, "Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party relies. . . ."[4] It cannot be doubted that the difference from the former statute which the latter indicates, is one of position only. The "cause of action," whatever it was under the Code, is the same thing under the Act. The decisions which refer to these provisions are unfortunately singular in that they throw very little light on the

[1] § 481, subd. 2.
[2] § 255, subd. 2. Thus far the change was a good one because it eliminated the enactment of theory into law. That is, the old form indicated of what a cause of action is constituted, but that portion of the statute is eliminated in the new form.
[3] § 254. [4] § 241.